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No. 99-1417

In The

Supreme Court of the United States

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM ROBERT DARE AND GARY PETILLO,
INDIVIDUALLY AND ON BEHALF
OF OTHERS SIMILARLY SITUATED,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents William Robert Dare and Gary Petillo, individually and on behalf of others similarly situated ("Respondents"), filed suit in the United States District Court for the Central District of California in challenge to the requirement of the State of California Department of Motor Vehicles ("Petitioner") that a fee be paid for placards allowing use of accessible parking accommodations for persons with disabilities. *See* Cal. Veh. Code § 2211.55(a). Respondents alleged that this fee constitutes discrimination against persons with disabilities prohibited by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA") (*see especially* 42 U.S.C. § 12132), and violates the ADA regulation codified at 28 C.F.R. § 35.130(f), which specifically prohibits public entities from imposing any surcharge on individuals with disabilities to cover the costs of measures necessary to provide the nondiscriminatory treatment required by the ADA.

The parties each moved for summary judgment on the claim for declaratory and injunctive relief. There was no dispute that Respondents were persons with disabilities under the ADA or that fees had been charged for placards allowing use of accessible parking. By its Order dated May 30, 1997, the District Court granted summary judgment in favor of Respondents, and issued an injunction prohibiting Petitioner from collecting the placard fee. The claim for reimbursement of fees unlawfully taken was not reached, and remains pending in the district court. On appeal from the injunction, Petitioner raises a host of challenges that were each rejected in *Dare v. State*

of California, 191 F.3d 1167 (9th Cir. 1999). Petitioner now seeks review of the Ninth Circuit's decision.

REASONS FOR DENYING THE WRIT

The burden is on the Petitioner to demonstrate that certiorari is appropriate, but the arguments raised by Petitioner fail to satisfy this burden. Petitioner poses three narrowly focused questions. The first question is whether Congress validly abrogated state immunity from federal challenge to fees imposed by states to pay for the cost of providing the access required by the ADA. Because few states currently impose such fees, certiorari review of the Ninth Circuit's ruling prohibiting such fees is not warranted. Questions 2 and 3 challenge the Ninth Circuit's conclusion on the merits that the ADA prohibits fees on placards allowing use of accessible parking, but the Ninth Circuit's decision in this regard is in accord with the conclusion of every other court to have reached this question and there is no circuit or district court conflict that might be resolved if these questions were addressed.

Permeating the petition is an additional question, not expressly framed, to wit, whether Eleventh Amendment abrogation questions should be analyzed under a broad focus, examining the federal enactment as a whole (as in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)), or a narrow focus, examining only a particular aspect of the challenged federal law (as in *Brown v. North Carolina Div.*

of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999)). This controversy is, however, limited to the Fourth and Ninth Circuits, and is insufficiently mature to be reached at this time.

Finally, denial is also appropriate because the only remedy that has been obtained in this case is injunctive relief, which may be obtained in federal court regardless of resolution of any Eleventh Amendment challenge.

A. Petitioner Has Not Stated Grounds For Review

A petition for writ of certiorari will be granted only for compelling reasons. *See* Supreme Court Rule 10. These reasons are to be directly-and concisely argued in the petition. Sup. Ct. R. 14(1)(h). Failure to state the reasons for review "with accuracy, brevity, and clarity . . . is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14(4).

Petitioner's petition is comprised almost entirely of argument on the merits. Very little is directed toward showing compelling reasons for this Court to resolve the three questions expressly presented.

1. The Petition Will Not Complement *Alsbrook*

Petitioner contends (Pet. 5-6) this case will provide a helpful complement to review of *Alsbrook v. City of Maumelle* (8th Cir. 1999), *cert. granted sub nom. Alsbrook v. Arkansas*, 120 S. Ct. 1003 (January 25, 2000). This argument no longer applies given the dismissal of the petition. *Alsbrook v. Arkansas*, 120 S. Ct. 1265 (March 1, 2000),

petition dismissed per stipulation. Nor will this case complement review of *Garrett*, due to the limited constitutional issue presented here by Petitioner in reliance on *Brown*.

2. The Disincentive Claim Is Unsupported

Petitioner argues (Pet. 6-7) that the Ninth Circuit's decision creates a disincentive to states that seek to implement programs on behalf of persons with disabilities that exceed the requirements of the ADA. There is nothing in the record to support this questionable premise. To the extent there is any information on this point, that information shows that most states implement placard programs, as well as other programs designed to open accessibility to persons with disabilities, without imposing any fee for such access. (*See* § B.1., *infra*.) The ADA sets a minimum floor of anti-discrimination standards. To the extent Petitioner suggests that states should be permitted to violate the ADA, lest they otherwise be discouraged from adopting (or withdrawing) measures that exceed that minimum floor, the suggestion should be rejected.

3. The Manageability Contention Is Unsupported

Petitioner argues without explanation or support that the prohibition of fees on access will extend the ADA beyond manageable bounds. The rule prohibiting such fees is clear and simple to apply. Petitioner has not even hypothesized how manageability problems could result

from the absolute prohibition on fees reflected in § 35.130(f).

4. Any Circuit Conflict Should Percolate

Petitioner notes the conflict between *Dare* and *Brown* over whether constitutional-abrogation issues are to be determined piecemeal or by examination of a Section 5 enactment as a comprehensive unit. But, as discussed more fully below, this doctrinal disagreement is too novel, too complex, and carries too many implications in too many cases to justify review at this time.

B. The Petition Does Not Raise Sufficiently Important Questions

As noted above, because the petition does not articulate compelling reasons, it should not be granted. *See* Sup. Ct. R. 10. Moreover, there are affirmative reasons why this petition should be denied.

The constitutionality of the abrogation of state immunities for suits under Title II of the ADA, *see* 42 U.S.C. § 12202, has, since the filing of the petition, become the subject of review by this Court. *University of Alabama at Birmingham Board of Trustees v. Garrett*, No. 99-1240, *on review from* 193 F.3d 1214 (11th Cir. 1999). However, Petitioner does not present this issue. Instead, Petitioner focuses narrowly on whether Congress has the power to prohibit states from requiring the beneficiaries of measures required under the ADA to pay for the costs of these measures.

1. Most States Do Not Impose Any Fee On Access

According to our research, the only systematic imposition of fees on measures affording access to persons with disabilities is the imposition of fees on the use of accessible parking placards.[1] However, most states do not currently impose placard fees. Some states no longer charge fees for placards as a result of legal challenges. *See, e.g., Thrope v. Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998). Colorado, Connecticut, and Nebraska have also been enjoined from collecting placard fees, but these injunctions are subject to review on appeal. *See Thompson v. Colorado*, 29 F. Supp. 2d 1226 (D. Colo. 1998) (appeal pending); *Duprey v. Connecticut*, 28 F. Supp. 2d 702 (D. Conn. 1998). To the best of our knowledge and research, no other state currently imposes fees on other measures necessary to afford accessibility.

The narrowness of this question is comparable to the primary issue in the petition in *Brown, petition filed* Sept. 8, 1999. The United States, which opposes the *Brown* petition, explained that the fee issue is too narrow to justify Supreme Court review:

> This case does not squarely present the broad question of whether the Disabilities Act reflects a proper exercise of Congress's Section 5 power.

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[1] At oral argument before the Ninth Circuit, Petitioner contended that it could impose fees on ramps that allowed access to people who are unable to use stairs. We are unaware of any State which has actually imposed ramp fees, or other fees to cover the cost of providing access.

> Rather, it presents only the narrow and relatively infrequently recurring question of whether a particular Department of Justice regulation . . . as specifically applied to a limited category of state fees, can validly be enforced against the States in federal court by private parties. Accordingly, further review of this case is not warranted.

Brief of United States in Opposition to Petition for Writ of Certiorari review of *Brown* at 9.[2] Because the questions presented by Petitioner apply only to the shrinking minority of states that charge for measures affording access for persons with disabilities, the questions here are too narrow to justify review by this Court.

2. The Nonconstitutional Issues Presented Here Are Not In Dispute Among The Courts

Questions 2 and 3 challenge the Ninth Circuit's interpretation and application of the ADA and attendant regulations. These questions also are too narrowly focused to warrant consideration by this Court. Moreover, there is no conflict on this issue as the Ninth Circuit's finding that the ADA prohibits fees on placards that permit use of accessible parking is in accord with the ruling of every

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[2] As further argued by the United States: "[T]he case presents only the question of whether the regulation as applied to the narrow circumstances presented here . . . falls within the Section 5 power. . . . The court of appeals' decision thus involved the distinctly limited question of whether a regulation as applied to a particular factual scenario fell beyond the Section 5 power. Such narrow rulings generally do not warrant an exercise of this Court's certiorari jurisdiction." *Id.* at 11.

other court that has reached a decision on this point. *See Thompson*, 29 F. Supp. 2d at 1229-1232; *Duprey*, 28 F. Supp. 2d at 705-711; *Thrope*, 19 F. Supp. 2d at 824-825; *McGarry v. Missouri Dep't of Revenue*, 7 F. Supp. 2d 1022, 1026-1029 (W.D. Mo. 1998), *vacated on other grounds*, (W.D. Mo. Jan. 31, 2000) (unpublished order); *Miller v. North Dakota Dep't of Transp.*, Case No. 96-C-1988 (Dist. N.D. 1997); *Keef v. State of Nebraska, Dep't of Motor Vehicles*, Docket 677 Page 536 (Dist. Ct. Lancaster Cty., Nebraska). Accordingly, there is no appellate or district court conflict that might justify review by this Court.

C. Controversy Regarding The Applicability Of Brown's Fourteenth Amendment Analysis Is Not Sufficiently Mature

There is a conflict between the Fourth and Ninth Circuits on whether Congress's abrogation of Eleventh Amendment immunity was appropriate as to 28 C.F.R. § 35.130(f), which prohibits imposition of fees to cover measures required by the ADA. The conflict arises from the Fourth Circuit's unique reasoning that inquiry as to the propriety of abrogation of Eleventh Amendment immunity may be had on a regulation-specific basis. This "narrow focus" doctrine holds that the particular regulation upon which a claim is asserted must be found to be within Congress's Section 5 power, without regard to whether the legislative enactment taken as a whole is within that power. *Brown*, 166 F.3d at 703-704. The Ninth Circuit considered and rejected the Fourth Circuit's narrow focus approach, *Dare*, 191 F.3d at 1175-1176, but no other published decision carefully examines this question.

The complexity and novelty of this issue are such as to require that jurisprudence be supplemented by development of additional case law, as augmented by academic comment, before deciding the point.

1. The Issue Is Novel

This Court has been properly hesitant to reach questions prematurely. "Wise adjudication has its own time for ripening." *Singleton v. Commissioner*, 439 U.S. 940, 943 (1978) (Stevens, J., respecting denial of certiorari) (quoting *Maryland v. Baltimore Radio Show*, 331 U.S. 912, 917-919 (1950) (Frankfurter, J., regarding denial of certiorari)). The use of a regulation-specific analysis in determining whether Congress has effectively abrogated state immunities occurred for the first time in February of 1999, in the Fourth Circuit's decision in *Brown*. Since then, the *Brown* approach has been meaningfully addressed only in footnotes in this case below.

2. The Issue Is Complex

The complexity of the question also justifies awaiting the development of a larger body of decisional authorities or commentary. This complexity can be illustrated by a short review of the arguments against the Fourth Circuit's approach, as raised here by Petitioner.

a. The *Brown* Court's Approach Is Inconsistent With Precedent

In examining whether Congress has confined itself to remedial lawmaking, or has instead attempted to redefine constitutional protections, this Court has instructed:

> While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

City of Boerne, 521 U.S. at 530. The test of congruence contemplates weighing the "measures" as cumulatively enacted against the "evil presented." This assigns a balancing test of means and ends; it does not call for pinpoint examination of whether any particular measure embodied in an enactment containing many measures can be justified in terms of remedying any one of the evils presented.

City of Boerne instructs that it is the Congressional enactment, as a whole, which must be weighed against the inequity to be remedied. The ADA's recitation of the historical sufferings of persons with disabilities demonstrates that the "evil presented" is patent and historic, and warranted redress by Congress. Indeed, Congress' detailed approach was heralded by the Supreme Court's opinion in *Cleburne*.

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators

> guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

Cleburne, 473 U.S. at 442-443. The rational relationship standard of review for disability classifications adopted in *Cleburne* was intended to encourage flexibility in legislative efforts to assist people with disabilities. *Id.* In contrast, *Brown*'s standard of pinpoint scrutiny effectively would deter legislative ingenuity on behalf of people with disabilities and usurp the legislative function, requiring courts to police the constitutionality of statutory and regulatory schemes, regulation by regulation.

Brown's narrow-focus approach would create the judicial equivalent of the line item veto legislation rejected in *Clinton v. City of New York*, 524 U.S. 417 (1998). The power to cancel portions of a law, rather than the law in toto, was recognized as sizably (and improvidently) enhancing the authority of the President at the expense of the Congress. *Id.* at 449-452 (Kennedy, J., concurring). Similarly, the narrow-focus review suggested by *Brown* would unduly augment the judicial authority at the expense of the elected branches. *Dare*, 191 F.3d at 1176 n.7.

Brown's approach also conflicts with the deference owed to Congress when reviewing laws enacted pursuant to Section 5. *See, e.g., City of Boerne*, 521 U.S. at 508 ("line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies"). It is the judiciary's province to determine whether Congress has embarked upon a mission which is

within the concerns of the Fourteenth Amendment, and whether Congress has done so through means reasonably designed to further this mission. It does not follow that every portion of an enactment can be subject to independent attack, or that the judiciary is empowered to examine the wisdom of the details of legislation.

b. The *Brown* Approach Will Multiply Litigation By Destroying The Precedential Value Of Decisions Upholding Or Rejecting The Constitutionality Of Congressional Abrogations

Secondly, but of no less concern, daunting administrative problems arise from *Brown*'s approach, which limits any abrogation precedent to the precise facts and claim presented. The decisions in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999); *Martin v. Kansas*, 170 F.3d 1305 (10th Cir. 1999); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *vacated in part on other grounds*, 120 S. Ct. 631 (2000); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998); and *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), each unconditionally uphold the ADA's abrogation of state immunities. Under these rulings, federal district courts in the Second, Fifth, Ninth, Tenth, or Eleventh Circuits are bound to deny motions to dismiss ADA cases on Eleventh Amendment grounds. Certainty prevails in the Seventh and Eighth Circuits as well, where *Alsbrook* and *Erickson v. Board of Governors*, 2000 U.S. App. LEXIS 5074 (7th Cir. March 27, 2000), clearly bar any Title II claim against a State in federal court.

In stark contrast, due to the narrow focus of *Brown*'s limited rejection of Congressional abrogation of the Eleventh Amendment, the Courts within the Fourth Circuit must examine and decide every Eleventh Amendment assertion afresh under the particular facts and legal claims asserted. Precedent can be of little value under the *Brown* approach because cases will always present distinguishing features when the focus is so close. Because every Eleventh Amendment dismissal and every denial of such a motion to dismiss is appealable, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139 (1993), every such ruling will generate an appealable issue. *Brown*'s approach turns on its head the dictate that litigation concerning the court in which a suit may be filed should be crafted, where possible, to avoid extensive threshold litigation over jurisdiction. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Contrary to this wisdom, the *Brown* approach fosters litigation which will require the extravagant allocation of resources on threshold jurisdictional questions. The narrow-focus analysis thus threatens to grievously multiply the burden on litigants and courts in having to repeatedly grapple with difficult abrogation questions.

c. Narrow Focus Is Not Required By Rules Of Constitutional Construction

Petitioner argues that narrow-focus review is required by canons of constitutional construction, which discourage constitutional rulings broader than necessary to the case presented. These canons arise in part from the prudential view that constitutional rulings should not be

chiseled into our jurisprudence unless necessary to decide a dispute. These canons are also a product of the nature of judicial power – the power to resolve disputes, but not step beyond the confines of such disputes to make unnecessary declarations of law.

Viewed in this manner, the canons relied upon by Petitioner operate to restrict the exercise of judicial power. It would misapply these canons to use them to restrict Congress' substantive power to legislate, while allowing the courts (in a legislative fashion) to selectively uphold or cancel individual components of legislation that, viewed as a whole, are within the scope of the Section 5 power.

* * *

Resolution of the disagreement between the Ninth and Fourth Circuits requires a resolution of how to determine whether Congress has acted within its Section 5 authority: whether to focus on the law enacted as a whole, or upon any specific regulation implicated by the facts at issue. Because this question is both novel and complex, and because it carries weighty implications extending to all causes of action created by Congress under Section 5 of the Fourteenth Amendment, the matter should not be reached too soon. Instead, it is respectfully submitted that this Court should await the development of additional decisional law and academic comment, so that a fuller body of jurisprudence will be available to guide the resolution of the question when the question is reached.

D. Only Injunctive Relief Has Been Entered

To date, Respondents have been afforded only injunctive relief. This form of relief is obtainable in federal court under *Ex parte Young*, 209 U.S. 123, 155-156 (1908), regardless of whether the ADA abrogated Eleventh Amendment immunity. Thus, a decision on the Eleventh Amendment issue now, given the current procedural status of this case, would answer only the question of whether suit must be against an officer of The Department of Motor Vehicles rather than the Petitioner itself.

E. Ninth Circuit's Rulings Are Correct

Most of the pages of the Petition are dedicated to arguing the merits. To the extent, if any, that the purpose of certiorari review is to correct error, that purpose would not be served here.

1. Congress May Prohibit Fees On Access

The wisdom of the Ninth Circuit's refusal to follow *Brown*'s narrow focus approach to abrogation issues is demonstrated at Section C, *supra*. Even if a narrow focus should be applied, that analysis will demonstrate that the prohibition of fees on access is within Congress's Section 5 authority.

a. The Fee Prohibition Serves The Purposes Of Section 5

The access fee prohibition is constitutionally related to the Fourteenth Amendment's purpose of deterring disability discrimination:

> All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims.

Brown, 166 F.3d at 708 (Murnaghan, J., dissenting). *See also Dare*, 191 F.3d at 1176. It is the Petitioner's proposition that is spectacular, *i.e.*, that it is appropriate to recoup ADA compliance costs from those whose disabilities require remediation and who, because of the discrimination they have suffered, are least able to pay it. *See* 42 U.S.C. § 12101(a)(6); Sen. Bob Dole, *Are We Keeping America's Promises to People With Disabilities – Commentary on Blanck*, 79 Iowa L. Rev. 925, 928 (1994).

The prohibition against fees on access is an essential protection for rights of access. To slightly rephrase Chief Justice Marshall's aphorism, the power to charge a fee on access is the power to destroy the right of access.[3] It

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[3] "That the power to tax invokes the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government the constitutional measures of another, which often, with respect to those measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943) ("power to tax the exercise of a privilege is the power to control or suppress its enjoyment").

follows that Congressional power to mandate accessibility (which Petitioner does not challenge) reasonably includes the power to prohibit any exaction which may burden that access.

b. Placard Fees Are Facially Discriminatory

Any fee system that targets the victims of discrimination for special assessments to cover the costs of remedying the wrongs will itself constitute invidious discrimination:

> It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

Brown, 166 F.3d at 709-710 (Murnaghan, J., dissenting). *See also Dare*, 191 F.3d at 1171 ("surcharges against disabled people constitute facial discrimination"). Equal employment opportunity laws, voting rights laws, and possibly every other Section 5 enactment that applies against state governments also impose substantial costs over time to the states. The arguments presented by Petitioner would effectively give the states limitless authority

to recoup these costs by fees imposed solely on the protected classes.

Special assessments targeting only persons with disabilities, or only women, or only African-Americans, are discriminatory on their face. In legislating against discrimination, Congress surely is not impotent to forbid assessments that uniquely target the protected class.

2. *Dare* Is Consistent With *Kimel*

Petitioner argues that this Court's decision in *Kimel* compels reversal. This is not the case. Grounds for distinguishing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, et seq. ("ADEA") from the ADA appear initially in *Kimel*'s review of the reasons why Congress has limited power to address differential treatment on account of age: (1) age classifications are often relevant to legitimate state interest; (2) older persons have not been subjected to a history of purposeful unequal treatment; and (3) the elderly do not constitute a discrete and insular minority because everyone will experience old age if they live their normal life spans. *Kimel*, 120 S. Ct. at 645. These points do not translate to the area of disability discrimination.

First, one express purpose for declining to apply heightened scrutiny in *Cleburne* was to allow for laws, like the ADA, designed to assist persons with disabilities:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

> Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-443 (1985). *Cleburne* cites laws such as the Rehabilitation Act of 1973, 29 U.S.C. § 794, as examples of the kinds of laws which should be given deference by the courts. The refusal to accord heightened scrutiny for disability classifications was designed to encourage legislative ingenuity on behalf of this disadvantaged group, and it would defeat this purpose to shackle the most important example of such legislative efforts. *See* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. Rev. 653, 689-693 (2000).

Second, there is no doubt that persons with disabilities have been subjected to a history of discriminatory treatment. As found by Congress: "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). *See also Cleburne*, 473 U.S. at 461. (Marshall, J., concurring in part and dissenting in part.) Finally, it is not necessarily or even usually the case that people live long enough to become disabled.

Thus, each of *Kimel*'s reasons for limiting Congressional power to confront state age discrimination is absent here. Moreover, *Kimel*'s conclusion that most differential treatment on the basis of age would be constitutionally permissible suggests that a ban on age

discrimination in state employment would be incongruent. But it is not established that most discrimination on the basis of disability is constitutionally permissible, and *Kimel* therefore does not control the question of Congressional power to confront state disability discrimination.

In addition, this Court has never held that Congress is barred from "reasonably prophylactic legislation," as long as the remedy is found appropriate, based in part upon a review of the legislative record. *Kimel*, 120 S. Ct. at 648. While the ADEA's legislative record provided no evidence of "any discrimination whatsoever that rose to the level of constitutional violation," *id.* at 649, the record with respect to the ADA is markedly different.

Congress found that persons with disabilities have suffered a historical, pervasive and continuing pattern of discrimination, including segregation and exclusion from public services and benefits, causing them to occupy a disadvantaged position in society. Isolation, segregation, exclusion, and other discriminatory treatment have been suffered in such areas as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. 42 U.S.C. § 12101(a). The problems of disability discrimination recounted in the ADA were not uprooted despite decades of more limited legislative efforts to control such forms of discrimination.[4]

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[4] *See generally Heather K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1263-1265 (N.D. Iowa 1995); Robert Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev.

These facts place the ADA on constitutionally sound footing, and distinguish it from the ADEA. *Dare*, 191 F.3d at 1174 n.3 (citing authorities).

3. Accessible Parking Is An ADA Mandate

Petitioner's arguments (Pet. 17-20) mistakenly assume that Respondents' claims depend upon placards themselves being required by the ADA. Respondents' claims are grounded on the right to use accessible parking, rather than on a right to enforcement of state parking laws. *See* 28 C.F.R. §§ 35.130(b)(4), 35.149, 35.150, 35.15(c); *ADA Accessibility Guidelines for Buildings and Facilities*, 28 C.F.R. Ch. I pt. 36, App. A., §§ 4.1.2, 4.3, 4.6. The ADA violation was triggered by the Petitioner's application of State police power to prevent people with disabilities from using accessible parking unless they paid the Petitioner's price. This charge is a facially discriminatory fee on access.

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413 (1991); Lowell P. Weicker, Jr., *Historical Background of the Americans With Disabilities Act*, 64 Temp. L. Rev. 387 (1991). In deciding whether Congress had a sufficient basis for enacting the ADA under Section 5, it will be necessary to consider their accumulated experience from these many other disability rights enactments. For example, from the legislative history of laws focusing on disability discrimination by public school systems, Congress knows that children with disabilities have been excluded from educational opportunities given to other children. *See Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 825 (8th Cir. 1999).

4. USPPD Does Not Allow Placard Fee

Petitioner's final argument is built from Public Law 100-641 (1988), and the Uniform System for Parking for Persons with Disabilities, 23 C.F.R. § Part 1235 ("USPPD"). The argument that these provisions authorize placard fees has been rejected by all courts addressing the issue because: (1) the USPPD does not invest authority to require a placard fee; and (2) if the USPPD granted such authority, it has since been countermanded by the ADA. *See Dare*, 191 F.3d at 1172; *Thompson*, 29 F. Supp. 2d at 1229-1231; *Duprey*, 28 F. Supp. 2d at 711; *McGarry*, 7 F. Supp. 2d at 1026-1027.

a. USPPD Does Not Authorize Placard Fee

Placard fees are not mentioned in the USPPD or Public Law 100-641.[5] Petitioner argues that it has been

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[5] *Thompson*, 29 F. Supp. 2d at 1231; *McGarry*, 7 F. Supp. 2d at 1027. The only mention of placard fees is the Advisory Committee report statement that: "Committee believes that the states should be permitted to exercise administrative discretion in determining the size, renewal period and fees for . . . placards." 56 Fed. Reg. 10328, 0344 (1991). The remark must be understood in its pre-ADA context. Most of the Advisory Committee's work was completed before the ADA was enacted, and the USPPD was promulgated before the Title II regulations issued. Viewed in this historical context, the Advisory Committee merely noted and withheld from abridging the pre-ADA power of the States to charge fees on access. At any rate, the report of the USPPD Advisory Committee should be given little weight. *Cf. Pulley v. Bowen*, 817 F.2d 453 (7th Cir. 1987) (Social Security Program Operations Manual could not be used in interpreting statute because not formally adopted as a regulation).

implicitly authorized to impose placard fees because the USPPD does not preclude a placard fee, but does prohibit any extra fee on access plates. Had Congress intended to authorize the States to charge for placards, it would have done so directly, and not by silence. The USPPD presents no impediment to determining that the subsequent prohibition against fees on access in the ADA applies. *See Thompson*, 29 F. Supp. 2d at 1230 ("the two statutes do not contain conflicting mandatory directives to the states"); *McGarry*, 7 F. Supp. 2d at 1027.

Nor do the purposes of the USPPD require a placard fee. The stated goal of the USPPD was not access, but safety.[6] Public Law 100-641 did not mandate, but merely encouraged, adoption of a uniform system for identifying vehicles serving people with disabilities which the States were free to reject. The USPPD is thus akin to a model code, setting forth guidelines which any state might choose to adopt, but not be compelled to follow. 23 C.F.R. § 1235.1 (1996). *See Dare*, 191 F.3d at 1172; *Duprey*, 28 F. Supp. 2d at 711; *McGarry*, 7 F. Supp. 2d at 1027.

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[6] Public Law 100-641 § 3(a)(1) & (b)(1). People with disabilities may be less able to avoid vehicles and more likely to stumble and injure themselves falling. In addition, wheel chair users are lower and more difficult to see than persons who walk; a driver who is about to back out of a parking space might not realize that there is someone in a wheel chair right behind. These safety problems are largely resolved by accessible parking so that people with disabilities need not traverse the parking area.

b. ADA Overrides USPPD

Even if the USPPD authorized placard fees, the ADA would control. First, the ADA preempts laws which provide lesser protections. Second, the broad goals of the ADA require this result. Third, the ADA is the later enacted statute. Finally, the Advisory Committee had no authority to make any determinations of rights under the ADA. *Accord McGarry*, 7 F. Supp. 2d at 1027 ("DOJ regulations prohibiting charges for benefits supersede any conflicting DOT regulations").

i. ADA Preempts Less Protective Laws

The ADA precluded all less protective laws to the extent they fail to fulfill the mandates of the ADA. *See Danfelt v. Board of County Commissioners*, 998 F. Supp. 606, 611 (D. Md. 1998); *Devlin v. Arizona Youth Soccer Ass'n*, 1996 U.S. Dist. LEXIS 12368 (D. Ariz. 1996). Congress included 42 U.S.C. § 12201(b) to preserve only laws offering greater or equal protections. Without Section 12201(b) the comprehensive reach of the ADA would have suggested that Congress intended to preempt the field entirely. *See Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1277 n.9 (1st Cir. 1993). Section 12201(b) defeats Petitioner's argument that it may impose fees on accessible parking, because any right to charge for access would curtail rights afforded under the ADA.

ii. Broad Goals Of The ADA Require Revocation Of Fees On Access

The ADA was designed to integrate persons with disabilities into the American mainstream by guaranteeing a panoply of rights that remove obstacles to their participation in American society. *See generally* 42 U.S.C. § 12101(a); *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *Heather K.*, 887 F. Supp. at 1263-1266. Any facially discriminatory fee on access is contrary to the goals of the ADA. As provided by 28 C.F.R. § 35.130(f):

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

This provision recognizes that there will be sizable costs associated with removing barriers and other vestiges of disability discrimination but that these costs must be carried upon all shoulders, and not covered by exactions which fall solely on persons with disabilities.[7] *See Martin*

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[7] As illustrated by the Technical Assistance Manual: "ILLUSTRATION: A community college provides interpreter services to deaf students, removes a limited number of architectural barriers, and relocates inaccessible courses and activities to more accessible locations. The college cannot place a surcharge on either an individual student with a disability (such as a deaf student who benefits from interpreter services) or on groups of students with disabilities (such as students with

v. Kansas, 170 F.3d 1305, 1307 (10th Cir. 1999); *Thrope*, 19 F. Supp. 2d at 819.[8]

That the rights afforded by the ADA include accessible parking should be uncontroversial. *McGarry*, 7 F. Supp. 2d at 1028. In contrast, the more limited goals of the USPPD (*see* n.6, *supra*) are in no way disserved by the access fee prohibition. Where separate acts of Congress are arguably inconsistent, but may be construed so that the goals of each may be achieved, such a construction is favored. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). There is no need to reach the strained interpretation proffered by Petitioner in order to force unnecessary conflict between these provisions.

iii. ADA Controls Over Pre-ADA Laws

If the USPPD authorizes placard fees, then a conflict is created between this alleged authorization and the ADA. Where there is a conflict between earlier and later enacted statutes, the later statute governs. *Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995).

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mobility problems who benefit from barrier removal). It may, however, adjust its tuition or fees for all students." *The Americans with Disabilities Act Title II Technical Assistance Manual* at II-3.5400 (Nov. 1993).

[8] The rule prohibiting discriminatory fees for measures required by the ADA is necessary both because the costs of ADA compliance are high, and because persons with disabilities are one of the most impoverished groups in the nation. 42 U.S.C. § 12101(a)(6); Dole, 79 Iowa L. Rev. at 928. In large part, this general impoverished condition of persons with disabilities is a product of the history of discrimination they have suffered. 42 U.S.C. § 12101(a)(2), (5), (7), & (9).

iv. Advisory Committee Had No Authority To Interpret The ADA

Congress gave authority to interpret Title II to the Attorney General, not the USPPD Advisory Committee. 42 U.S.C. § 12134. Deference to the ADA's regulations is appropriate because Congress delegated this task to the Attorney General. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). On the other hand, because the Advisory Committee was not entrusted to interpret the ADA, its remarks bear no weight in determining ADA rights. *Id.* Therefore, even if there is conflict between agency interpretations, the Title II regulations control.

CONCLUSION

As reviewed above, there are many reasons to deny the petition here presented. A review of the various points asserted in the petition demonstrate that Petitioner has failed to satisfy the burden it must carry to obtain review by this Court, and that the petition should be denied.

RESPECTFULLY SUBMITTED this 25th day of April, 2000.

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